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Supreme Court of the United States

OCTOBER TERM, 1947

No. 646

IN RE: SITTON & HERBERT, BANKRUPTCY

J. B. MILLER, TRUSTEE,
Petitioner and Appellee below,

v.

THE TEXAS COMPANY,
Respondent and Appellant below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FIFTH CIRCUIT, INCLUDING SUPPORTING BRIEF

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SUBJECT INDEX

	Page
Petition for Writ of Certiorari	1
Summary Statement of the Matter Involved	1
Reasons Relied Upon for the Allowance of the Writ	3
Brief in Support of Petition for Writ of Certiorari	9
Opinions of Courts Below	9
Jurisdiction	10
Statement of the Case	11
Specifications of Error	11
Argument	12
Summary of Argument	12
Points	14
Point A	14
Point B	14–15
Point C	15
Argument in Support of the Above Points	15
Statement	15
Provisions of the Texas Statute	16
Argument Continued	20
Authorities Listed	22–23
Conclusion	37

Page

Re: Atlas Television Company, Inc., 273 N. Y. 51; 6 N. E. (2d) 94 ..... 22, 24, 25, 26, 27, 29

Barbee v. Oklahoma Tax Commission (C. C. A. 10th Cir.), 103 Fed. (2d) 114 ..... 4, 22, 27

Central Trust Company v. George Leuders & Company, 239 U. S. 11 10

City of New York v. Feiring, 188 Fed. (2d) 329 ..... 4, 5, 10, 22, 29

City of New York v. Goldstein, 299 U. S. 522 ..... 3, 4, 10, 22, 25, 27

In Re: Conklin, Gulf Oil Corporation v. Grady (C. C. A. 2nd), 110 Fed. (2d) 178 ..... 4, 5, 23, 30, 31, 32

Gibson Company, Inc. v. Oklahoma Tax Commission, 68 P. (2d) 87 23

Graham Brothers, Inc. v. City of Los Angeles, 45 P. (2d) 450 23

Re: Harris (Clift v. Tax Commission), 88 P. (2d) 372 23

In Re: Lazaroff, 84 Fed. (2d) 982 ..... 3, 23, 24, 36

In Re: National Studios, Inc. 4, 26

In Re: Newland, Appeal of Gulf Oil Corp. (C. C. A. 3rd), 115 Fed. (2d) 165 ..... 4, 5, 22, 31

People v. Venturia Refining Company (Calif. Sup.), 286 P. 347 23

In Re: Riemer (C. C. A. 2nd), 82 Fed. (2d) 162 ..... 4, 5, 23, 31, 32, 37

Rio Grande Oil Company v. City of Los Angeles, 44 P. (2d) 451 23

Re: Rockaway Paint Center, 291 N. Y. S. 341 23

William R. Staats Company v. Security Trust & Savings Bank, 243 U. S. 212 10

The Texas Company v. Blue Way Lines, Inc. (C. C. A. 1st Cir.), 93 Fed. (2d) 593 36

Page

Table of Statutes Cited

Texas Motor Fuel Tax Law, Vernon's Annotated Civil Statutes, Articles 7065b-1 to 7065b-29, Incl. (Pocket parts) 2, 11, 12, 16, 17, 18, 19, 20, 25

Section 24c of Bankruptcy Act [U. S. Code, Title 11, Section 47 (1938 amendment)] 10

Judicial Code, Section 240a (Amendment) [28 U. S. C. A., Section 347-a] 10

Section 64a(4), Bankruptcy Act [U. S. Code, Title 11, Chapter 7, Section 104] 2, 3

Table of Text Books Cited

Collier on Bankruptcy (Moore Oglebay), page 2132 (64.405) 5

Collier on Bankruptcy (Moore Oglebay), pages 2125 to 2132 (64.405) 21, 22, 23

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v.

THE TEXAS COMPANY,
Respondent and Appellant below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Supreme Court of the United States:

Your Petitioner respectfully shows:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED

This is a proceeding in bankruptcy, in which, on appeal to the United States District Court, by the Trustee in bankruptcy, from an order of the referee adjudging a claim of The Texas Company, filed in said proceeding, entitled to priority payment, to the extent of $2,249.77, the

order of the referee was reversed. [R. 10.] From the order of the District Court denying such priority, The Texas Company appealed to the U. S. Circuit Court of Appeals for the Fifth Circuit, which reversed the judgment of the District Court, thereby sustaining the claim of priority. [R. 17.]

The principal question upon said appeal (and the question determinative of all others) was whether under the Texas Motor Fuel Tax Law (Vernon's Annotated Civil Statutes, Article 7065b-1 to 7065b-29 incl.) The Texas Company, by payment of gasoline taxes to the State, due upon sales of gasoline made by it to Sitton & Herbert for use, other than upon highways, thereby discharged a sole tax liability of its own; or whether it thereby discharged a primary tax liability of the purchaser, Sitton & Herbert. [R. 21, 26.]

Another question (controlled, however, by the first) was whether The Texas Company, by payment of such gasoline taxes to the State, became subrogated to the rights of the State against Sitton & Herbert, thereby entitling it to priority in payment of its claim against the latter out of the bankrupt estate, under the prdovisions of Section 64a (4) of the National Bankruptcy Act. [R. 23.]*

The Circuit Court of Appeals on December 30, 1947 [R. 17] (rehearing overruled on January 21, 1948) [R.

* 64a(4) provides: "Debts to have priority in advance of the payment of dividends to creditors and to be paid in full out of the bankrupt estates, and the order of payment shall be (1) * * *, (2) * * *, (3) * * *, (4) taxes legally due and owing by the bankrupt to the United States or any state or any subdivision thereof."

36], in reversing the judgment or order of the District Court, as the basis of such action, among other things, held:

1. That provisions of said statute "definitely show that the obligation to pay the tax is on the consumer"; that appellant as a distributor was required to *collect* the tax and to remit it to the State, but the obligation was on the purchaser to pay, or to bear the tax"; [R. 21] that in the present case, "The Texas Company paid a tax to the State that was the ultimate and primary obligation of the bankrupts." [R. 26.] (Emphasis by the Court).

2. That to the extent of $2,249.77 (the amount of a refund made by the State to the Trustee in bankruptcy) the appellant was subrogated to the rights of the State to a priority in payment of the amount of such refund under the provisions of Section 64a(4) of the Bankruptcy Act. [R. 23.]

II.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

1. The Circuit Court of Appeals in holding that under the provisions of the Texas Motor Fuel Tax Law the purchaser, and not the vendor, is primarily liable to the State for the payment of gasoline taxes, decided the same question in the same way as the Circuit Court of Appeals for the Second Circuit in *In Re: Lazaroff*, 84 Fed. (2d) 982, to review and correct which this Court granted its writ of certiorari and reversed the case, in *City of New York v. Goldstein*, 299 U. S. 522.

2. The Circuit Court of Appeals in holding that under the provisions of the Texas Motor Fuel Tax Law, the purchaser, and not the vendor, is primarily liable to the State for the payment of gasoline taxes, decided the same question in the same way as said Circuit Court of Appeals for the Second Circuit in *In Re: National Studios, Inc., City of New York v. Fiering*, 118 Fed. (2d) 329, to review and correct which, this Court granted its writ of certiorari and reversed the case, in *City of New York v. Feiring*, 313 U. S. 292.

3. The Circuit Court of Appeals in deciding that the purchaser, and not the seller, is primarily liable to the State for the payment of gasoline taxes is in conflict not only with the decisions of the Supreme Court in *City of New York v. Feiring*, 313 U. S. 292 and *City of New York v. Goldstein*, 299 U. S. 522, but also in conflict with the decisions of other Circuit Courts of Appeals as follows *In Re: Newland, Appeal of Gulf Oil Corporation* (C. C. A. 3rd), 115 Fed. (2d) 165; *In Re: Conklin, Gulf Oil Corporation v. Grady* (C. C. A. 2nd), 110 Fed. (2d) 178; *Barbee v. Oklahoma Tax Commission* (C. C. A. 10th), 103 Fed. (2d) 114; *In Re: Riemer* (C. C. A. 2nd), 82 Fed. (2d) 162.

4. The Circuit Court of Appeals in holding that the purchaser, and not the seller of gasoline, is primarily liable for payment of the taxes to the State has thereby determined the further important Federal question that "taxes due and owing by the bankrupt", a claim for which said

Section 64a(4) of the Bankruptcy Act provides shall be given priority, means (as applied to gasoline taxes), taxes due and owing by the purchaser when bankrupt, and not taxes due and owing by the seller when bankrupt, said decision being contrary to all the decisions above cited.

5. The decision of the Circuit Court of Appeals in holding that The Texas Company, by payment of taxes to the State, thereby acquired by subrogation rights entitling it to any priority in payment of its claim against the bankrupt estate for the amount of taxes so paid, is in conflict with the decision of the Circuit Court of Appeals of the Second Circuit in *In Re: Conklin* (C. C. A. 2nd), 110 Fed. (2d) 178, and the decision of the Circuit Court of Appeals of the Third Circuit in *In Re: Newland* (C. C. A. 3rd), 115 Fed. (2d) 165, and the decision of the Circuit Court of Appeals for the Second Circuit in *In Re: Riemer* (C. C. A. 2nd), 82 Fed. (2d) 162.

6. It having become settled law, as determined by this Court in *City of New York v. Feiring*, 313 U. S. 292, and the other decisions of this Court and of Circuit Courts of Appeals hereinabove cited, that (to quote from *Collier on Bankruptcy*, page 2132, Paragraph 64.405) "if a sales tax or gasoline or similar tax is construed as collectible from the vendor of the commodity, irrespective of his ability to pass on the burden to the consumer-vendee, or whether he collects the tax at all, such an impost is a tax 'legally due and owing by the bankrupt' under Section 64a(4) where

a claim therefor is made in the bankrupt estate of the vendor"; and the Texas Motor Fuel Tax Law certainly and unambiguously providing that the tax in question is "collectible from the vendor of the commodity, irrespective of his ability to pass on the burden to the consumer-vendee, or whether he collects the tax at all"; and there being no provision of said statute requiring, under any contingency, the direct payment of the taxes by the purchaser to the State; the decision of the Circuit Court of Appeals in this case to the contrary is of great public importance. The decision, if permitted to stand, will inevitably interfere with the due administration of the bankruptcy laws; it will produce conflicts and confusion in the decisions of courts passing upon questions relating to sales taxes, motor fuel taxes, and all taxes where a private person is by law charged with the duty of collection and payment of any such taxes to the United States, the several states, or municipalities therein.

WHEREFORE, your Petitioner prays that a writ of certiorari issue under the seal of this Court directed to the Circuit Court of Appeals for the Fifth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Court had in the case numbered and entitled on its docket No. 12,142, The Texas Company, Appellant v. J. B. Miller, Trustee in Bankruptcy of the Estate of Sitton & Herbert, Bankrupts, Appellee, to the end that this cause may be removed and determined by this Court as provided

for by the statutes of the United States; and that the judgment herein of said court be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated February 21, 1948.

Respectfully submitted,

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J. B. MILLER, TRUSTEE,
Petitioner and Appellee below,

v.

THE TEXAS COMPANY,
Respondent and Appellant below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINIONS OF COURTS BELOW

There was no written or published opinion of the United States District Court.

The opinion of the Circuit Court of Appeals is not yet reported, being dated December 30, 1947; motion for rehearing overruled, without opinion, on the 21st day of January, 1948.

II.
JURISDICTION

1. The date of the decree to be reviewed is January 30, 1947, made final by order overruling appellee's motion for rehearing on the 21st day of January, 1948.

2. The statutory provisions which are believed to sustain the jurisdiction of this Court are:

(a) Sec. 24c of the Bankruptcy Act [U. S. Code Title 11, Sec. 47 (1938 Amendment)].

(b) Judicial Code, Section 240a (amended) [28 U. S. C. A., Sec. 347-a].

3. The case is an appeal, in a proceeding in bankruptcy, involving the refusal of the United States District Court, on review of an order of the referee in bankruptcy, to allow priority to the extent of $2,249.77 of a claim of $3,944.81. [R. 10.] The decision of the Circuit Court of Appeals is final unless upon writ of certiorari it be reviewed and reversed by the Supreme Court.

4. Cases believed to sustain said jurisdiction are as follows: *William R. Staats Company v. Security Trust & Savings Bank*, 243 U. S. 212; *Central Trust Company v. George Leuders & Company*, 239 U. S. 11.

See also *City of New York v. Feiring*, 313 U. S. 299, and *City of New York v. Goldstein*, 299 U. S. 522, for examples of cases in which the jurisdiction of the Supreme Court, in cases like this, was recognized by granting writs of certiorari.

III.
STATEMENT OF THE CASE

The statement in the preceding Petition under I, page 1, is adopted as the statement of the case in this brief.

IV.
SPECIFICATIONS OF ERROR

1. The Circuit Court of Appeals erred in holding [within the meaning of Sec. 64a(4) of the National Bankruptcy Act] that "the statutes of Texas [Art. 7065b-1 to 7065b-29, Vernon's Annotated Civil Statutes of Texas] "definitely show that the obligation to pay the tax is on the consumer"; that [while] "appellant as a distributor was required to *collect* the tax and to remit it to the State, the obligation was on the purchaser to *pay*, or to bear, the tax"; and that "The Texas Company paid a tax to the State that was the ultimate and primary obligation of the bankrupts." (Emphasis by the Court.)

2. The Circuit Court of Appeals erred in sustaining appellant's contention, stated in the language of the Court, as follows: "The appellant contends that since it was required by the law to pay the taxes which Sitton & Herbert owed but failed to pay, a right of subrogation arises in its favor as to the taxes so refunded to the trustee in bankruptcy of the delinquent tax payer."

3. The Circuit Court of Appeals erred in its decision, in that it has so construed the Texas Motor Fuel Tax Law that if a purchaser of gasoline pays the amount of taxes to the refund dealer but the latter, failing to pay the tax to

the State, becomes bankrupt, the State in its claim against the bankrupt estate of such dealer can have no priority, thus defeating the manifest intent and purpose of Section 64a(4) of the National Bankruptcy Act.

V.
ARGUMENT

Summary of the Argument

Petitioner contends that within the meaning of Section 64a(4) of the Bankruptcy Law, the Texas Motor Fuel Tax Law (which will for brevity hereinafter be referred to simply as the Statute, or the Texas Statute), under the authorities herein cited, made The Texas Company as the dealer solely liable to the State for payment of the taxes. The only duty of a purchaser is to pay, or in good faith satisfy the dealer. His duty is discharged if the dealer charges him on account with the amount of the taxes which the dealer—not the purchaser—is under legal duty to pay to the State. The dealer had the right (and under the literal wording of the Statute, the duty) to collect from the purchaser the amount due the State for taxes. The only duty of the purchaser imposed by the Statute to pay anything to the dealer or the State is such as may be implied from the duty of the dealer to *collect*, as expressed in the Statute. Obviously, such duty was owing to the dealer and not to the State. Such duty, though fully discharged, would not constitute *payment to the State* of the taxes *due to the State*. The taxes, as taxes would not be paid, or the tax liability discharged, unless and until the dealer paid the

amount due the State. When, therefore, The Texas Company—the dealer—made the payment it did to the State, the amount of which it had charged on account to Sitton & Herbert, it paid "taxes" in discharge of its own tax liability.

For two reasons The Texas Company, by payment of the taxes to the State, could acquire no rights under the doctrine or principle of subrogation. According to elementary principles, it could acquire no right of subrogation by paying its own primary or sole obligation. It could acquire no right of subrogation as to Sitton & Herbert when the State itself never had a right to enforce any tax claim against them.

The Texas Company did not claim, and the Circuit Court of Appeals did not hold, that *independently* of the question of whether the primary or sole tax liability was on the dealer, the claim was entitled to priority. True, the matter of a refund in the sum of $2,249.77, voluntarily made by the State to the trustee, served to confuse the issues. It was tied into the question of subrogation by the claimant's limiting its claim of priority to the amount of the refund, the total claim being for a larger amount. But the claim of priority impliedly presupposed that the amount of the refund was an asset of the bankrupts' estate; and, as said before, The Texas Company asserted no right not dependent upon the validity of its contention that Sitton & Herbert were primarily liable to the State of Texas for the taxes; and that, in paying the taxes to the State, it merely advanced the money and paid Sitton & Herbert's taxes for Sitton & Herbert; and was, therefore, subrogated to the

rights of the State against Sitton & Herbert. The trustee conceded, and here concedes, that if such contention is valid, then The Texas Company was by subrogation entitled to priority, not for the particular amount of the refund, but (if it had claimed it) the whole amount of the claim.

The details of the argument here summarized with the supporting authorities follow.

POINTS

The above "Specifications of Error" 1, 2 and 3 will be argued as Petitioner's Points, being briefly hereafter stated together as Point A, Point B, and Point C. These points are so closely inter-related, one depending so much upon another, that any attempt to argue them separately would involve unavoidable repetitions. Under the circumstance, we think we can best serve the purposes of the rules by stating the points together, followed by the necessary statement, authorities, and argument applicable to all.

POINT A

The error of the Court in holding that [within the meaning of Section 64a(4) of the Bankruptcy Act] the Texas Statute imposes primary liability on the purchaser to pay gasoline taxes to the State.

POINT B

The error of the Court in sustaining the contention of appellant that by payment of the gasoline taxes to the

State, it acquired by subrogation a right to priority payment of part of its claim in the bankrupt estate of the purchaser.

POINT C

The error of the Court in so construing the tax statute that if a purchaser of gasoline pays the amount of taxes to the dealer, but the latter fails to pay the taxes to the State and becomes bankrupt, the State, under Section 64a(4) of the Bankruptcy Act, can have no priority in its claim against the bankrupt estate of the dealer.

Argument in Support of the Above Points

Statement

[Note: The Texas Statute comprises about thirty-four printed pages. Its validity is not challenged. The great importance of this case is not in the amount of money involved. The extra expense of printing the brief with the Statute included as an appendix would be considerable. Its utility in aiding the Court, we think, would be negligible. Feeling sure the Statute is available to the Court, we pray to be relieved from making it an appendix to the brief, and will briefly state the nature of all provisions which we think can be regarded as material upon the questions presented].

The Court below stated the ultimate question to be determined thus:

> "The ultimate question presented by this appeal is whether or not under Article 7065b-1 to 7065b-29, Ver-

non's Annotated Civil Statutes of Texas, a refund dealer who sells gasoline on credit to a purchaser for a non-highway use and charges the account of the purchaser separately with the gasoline and with the taxes, which taxes the seller in compliance with the Statute thereafter paid to the State and which the purchaser failed to pay to the seller, but on the contrary secured a refund of those taxes from the State through his trustee in bankruptcy, should in bankruptcy have a priority claim against the trustee for the taxes so refunded." [R. 19.]

The Court held that the primary tax liability was on the purchaser and sustained appellant's claim to a right of subrogation and priority. [R. 29.]

Provisions of the Texas Statute

[Note: The added emphasis throughout the remainder of this brief is by us unless otherwise stated].

Section 2 levied and imposes an "occupational or excise tax of four cents (4¢) per gallon upon the first sale, distribution or use of motor fuel in the State." It provides that every distributor who makes a first sale or distribution for any purpose whatever "shall at the time of such sale or distribution *collect the said tax from the purchaser* or recipient of said motor fuel, in addition to his selling price, and shall report and pay to the State of Texas the tax so collected at the time and in the manner as hereinafter provided." It is stated as the intent and purpose of the Statute "to collect the tax levied herein at the source of said motor fuel in Texas, or as soon thereafter as same may be subject to being taxed." It is further provided (b) that one per cent (1%) of the taxable gallonage shall be

deducted by the distributor to cover losses, expenses of collecting and complying with the provisions of the Statute.

Section 3 requires distributors, on the 20th day of each month, to remit or pay over to the State all taxes *required to be collected*, during the preceding calendar month and to make reports, which among other things, show how much gasoline had been sold. It provides (c) for appointment of auditors to ascertain the correct amount due and for a penalty on the amount shown by the audit to be due and not paid.

Section 4 provides that all taxes collected by distributor shall be for the use and benefit of the State of Texas and should be paid to the State as provided. Any willful failure or refusal to pay is made a penalty; also makes a felony any fraudulent misapplication or conversion of taxes.

Section 6 requires distributors to make applications for permits, furnishing particular information on prescribed forms, and prohibits sales unless and until permits are granted, or after revocation.

Section 7 requires every distributor to make bond "conditioned upon full, complete and faithful performance by the distributor of all the conditions and requirements imposed upon him" by the Statute, including "the remittance and/or payment at Austin, Travis County, Texas, of all taxes collected *and required to be collected* for the use and benefit of the State."

Section 8 provides as security for "all taxes collected and *required to be collected* the State shall have a lien on all the property of the distributor."

Section 9 provides for records to be kept by distributor and preserved for two years, showing among other things: "(b) the name and address of each purchaser * * * and the amount of any such commodity so sold * * *." It further provides that where a distributor markets his products through his own service stations, that as to said service stations it will be sufficient to keep the records at said service station. [See Section 10 infra.]

Section 10 requires dealers to keep manifest and book records; requires detailed records giving information of a nature from which it is apparent that the dealer could be readily checked to show just how much taxes would be *required to be collected.*

Section 13 defines *refund dealer;* provides for licensing same, penalty against any person selling motor fuel upon which a refund of taxes may be authorized or claimed without refund dealer's license. It prohibits refunds when purchase not made from licensed dealer. It provides for two classes of refunds; one only to purchasers, or users who actually use gasoline other than upon highways. As to this class, it is provided that "if he (the Comptroller) finds that such claims (for refund) are just and that the taxes claimed have actually been paid by claimant," he shall make the refund. The other class of refunds applies to dealers or generally authorizes refunds of taxes upon motor fuel in quantities of 100 gallons or more destroyed by fire or accident, and taxes on gasoline sold to agencies of the Federal Government.

Section 16 relates to the cancellation of the distributor's permit or a "refund dealer's license" for enumerated reasons, including failure "to remit or pay to the State of Texas *any tax levied herein*, which said tax *is shown to have accrued and to be owing to said State* by a duly verified audit made by an authorized representative of the Comptroller from any report filed with the Comptroller, or from any books or records required to be kept."

Section 17 provides for admissibility of evidence in suits by the State *against distributors.*

Section 18 provides for suits against any person affected by the Act and specifies grounds (a) to (o) inclusive, all of which apply to distributors and dealers except in (m). "[Any person who] shall make any false statement in any claim for refund of motor fuel taxes as to any material fact required to be given."

Section 20 contains enforcement provisions which as they apply to a purchaser, or anyone other than a distributor or dealer, may be satisfied by proof "that the motor fuel has been sold with *the State tax as a part of the consideration therefor.*"

Section 22 provides for waiver of forfeiture provisions upon conditions specified and further "if upon examination of records or other investigation, the Comptroller finds that motor fuel has been sold without the tax levied hereon having been paid to the State or accounted for by a bonded distributor, he shall have the power to require such person to pay into the State Treasury, through the Comptroller, the taxes due and a penalty equal to the amount of such

taxes due. *If the person who has made such sale* is unable to furnish sufficient evidence to the Comptroller that said tax has been paid, or accounted for, by a bonded distributor, the prima facie presumption shall arise that such motor fuel was sold without said tax having been paid.

Section 26 prescribes misdemeanor penalties for acts enumerated (a) to (p) inclusive, all of which apply only to dealers.

Section 27 prescribes felony penalties for acts enumerated (a) to (w) inclusive, the only ones, at least the only material ones, applicable to a purchaser of gasoline for use other than upon highways being (j) and (l) reading: "(j) whoever shall knowingly purchase or receive from a distributor motor fuel upon which a tax is required to be paid *without said tax being a part of the consideration involved in such transaction*, or * * * (l) whoever shall willfully and knowingly make any false statements in any claim for refund delivered to or filed with the Comptroller * * *."

Argument Continued

As important as the provisions of the Statute is the absence of certain provisions. Some of these absent provisions may be summarized as follows: The most important perhaps is the absence of any provisions purporting to impose any liabiilty on a purchaser to pay taxes directly to the State. There is no provision which forbids one to purchase gasoline without paying the tax in cash. There is no provision which prohibits a dealer, selling gasoline, from making a sale without collecting the amount of the tax

in cash. There is no provision which prohibits a dealer from reporting a tax as collected which, although not collected *in cash*, is by extending credit to the purchaser charged to the purchaser and constituting a debt due to the seller. There is no provision that a dealer shall report and pay *only* amounts collected (in cash) from purchasers. There is no provision that a purchaser shall procure license, make bonds, keep records, make reports, make payments (except apparently as a condition to a refund as provided in Section 13); or his property be subject to a lien or that he be subject to any fines, forfeitures, penalties, interest, or costs, etc., except Section 20, which provides for the exoneration of a person in possession of gasoline, under suspicion, by proving that the motor fuel had been sold *with the State tax as a part of the consideration therefor*, and Sec. 27 (j) and (l) set out in the foregoing statement.

Any legislation so comprehensive and containing so many detailed provisions as the Texas Statute will inevitably contain some ambiguities, but we think the Statute is not ambiguous as to whether it provides that the only duty of payment imposed on the purchaser is to pay the amount of the tax to the dealer; and that the gasoline tax is collectible from the vendor or dealer, irrespective of his ability to pass on the burden to the consumer-vendee, or whether he collects the tax at all. It clearly does so provide. The Texas Company itself, as shown in our second Specification of Error, shows its construction of the Statute to be that it was "required by law to pay the taxes." The claim itself, of course, shows that the taxes had not been collected at all. Hence, we deem it an unwarranted waste of time to discuss

in detail the various provisions of the Statute, the essential facts being thus in effect admitted. *Collier on Bankruptcy* shows that its authors or editors have made a careful study of the once conflicting decisions, and regarding the *Feiring* case, hereafter discussed, as having settled the law, has reached the conclusion that "If a sales tax or gasoline, or similar tax, is construed as collectible from the vendor of the commodity, irrespective of his ability to pass on the burden to the consumer-vendee, or whether he collects the tax at all, such an impost is a tax 'legally due and owing by the bankrupt' under Sec. 64a(4) where a claim is made in the bankrupt estate of the vendor." *Collier on Bankruptcy*, p. 2131 (64.405). If this be the correct conclusion as to the meaning and effect of controlling decisions, we think it is conclusive of every question in this case not rendered immaterial, and shows that the decision of the Circuit Court of Appeals is clearly wrong and presents the conflicts alleged.

The following decisions and authorities, in our opinion leave no escape from the above conclusion of the text writers:

City of New York v. Feiring, 313 U. S. 292;

City of New York v. Goldstein, 299 U. S. 522;

Re: Atlas Television Company, Inc., 273 N. Y. 51; 6 N. E. (2d) 94;

Barbee v. Oklahoma Tax Commission, 103 Fed. (2d) 114 (C. C. A. 10th Cir.);

In Re: Newland, Appeal of Gulf Oil Corporation, 115 Fed. (2d) 165 (C. C. A. 3rd Cir.);

In Re: Conklin (Gulf Oil Corporation v. Grady), 110 Fed. (2d) 178 (C. C. A. 2nd Cir.);

In Re: Riemer, 82 Fed. (2d) 162 (C. C. A. 2nd Cir.);

Re: Harris (Clift v. Tax Commission), 88 P. (2d) 372 (Oklahoma Supreme);

People v. Venturia Refining Company (Calif Sup.), 286 P. 347;

Re: Rockaway Paint Center, 291 N .Y. S. 341;

Collier on Bankruptcy, Sec. 64.405, pages 2125 to 2132.

See also *Gibson Company, Inc. v. Oklahoma Tax Commission*, 68 P. (2d) 87; *Graham Brothers, Inc. v. City of Los Angeles*, 45 P. (2d) 450; and *Rio Grande Oil Company v. City of Los Angeles*, 44 P. (2d) 451.

Re: Lazaroff [*City of New York v. Goldstein* (C. C. A. 2nd Cir.), 84 Fed. (2d) 982], involved consideration of a New York City sales tax law in essentials the same as the Texas Statute, but with one difference, not involved in the decision, which must be borne in mind to avoid confusion, not only in appraising that case, but the other cases dealing with the same New York City sales tax statute. The New York sales tax law imposed the obligation to collect and pay the tax upon the vendor, the same as the Texas Statute, and statutes involved in the other decisions herein discussed, but further provided that if the vendor failed to pay it, it was the duty of the purchaser to make a return and pay the tax directly to the Comptroller. The question in that case was whether the claim of the city for taxes, not paid by either the vendor or purchaser, made in the bank-

rupt estate of the vendor, was a *claim for taxes* entitled to priority. The Court, distinguishing between a "debt" and a "tax", held, just as the Court in the present case, that the tax, *as a tax*, was due by the purchaser and that, therefore, the City's claim in the bankruptcy of the vendor, being for a debt, and not a tax, was not entitled to priority. The Supreme Court at first denied a writ of certiorari, but later, on the authority of *Re: Atlas Television Company, supra*, granted a writ of certiorari and reversed the case. *City of New York v. Goldstein*, 299 U. S. 52.

Re: Atlas Television Company, supra, involved the same sales tax law and a claim of the City of New York for taxes, and priority payment, against an assignee for the benefit of creditors of the insolvent vendor. The Court sustained the claim of priority. Noting that in *Re: Lazaroff, supra*, the Court had held the obligations imposed by the Statute constituted a *tax* upon the purchaser and a *debt* of the vendor in the amount of money which he collected or should have collected, from the purchaser, said: "We might agree with that conclusion if the local law did not contain other provisions which indicate that the obligation imposed upon the vendor is in the nature of a tax. He must file a return of his receipts from sales, Sec. 5. The duty of payment to the city is laid upon the vendor, *not the purchaser*. His liability is not measured by the amount actually collected from the purchaser, but by the receipts required to be included in such return, Sec. 6. He must pay the taxes even if failure to collect is due to no fault of his own * * *." Everything so said as showing why the Court could not agree with the *Re: Lazaroff* decision is true of the Texas Stat-

ute. In further amplification of reasons, it was said: The city "has provided that the vendor of property must pay the tax to it although the vendor is required, at least in most cases, *to collect the tax from the purchaser for and on account of the city.* The purpose of that provision is to place the incidence of the tax immediately on the consumer [the Texas Statute expressly so declares its purpose]. *The city can collect only from the vendor.** The vendor's obligation to pay the tax is not measured by the amount collected nor dependent upon failure to exercise the diligence in collection which would be required of an agent. It is an obligation measured by the receipts of the vendor and created by local law. If the city has no priority in collecting a claim founded upon this obligation, the other creditors of the vendor share in money collected by the vendor for payment to the city. Fine-spun distinctions are here out of place. The local law provides that the 'vendor shall pay the tax' and the city is entitled as sovereign to priority for such payment."

If we should rest with these three decisions, we would, no doubt, be met with the contention that the action of the Supreme Court in *City of New York v. Goldstein, supra,* was controlled by the State Court's decision in *Re: Atlas Television Company, supra,* and would not be conclusive au-

* In making this statement, true of the Texas Statute, and all others involved in decisions herein discussed, the Court apparently did not have in mind since it was immaterial to the question there involved, the provisions of Sec. 2 of the Act quoted on the same page as follows: "Where a purchaser has failed to pay, and a vendor has failed to collect, a tax upon a sale or service as imposed by this local law, then in addition to all other rights, obligations and remedies provided, such tax shall be payable by the purchaser directly to the Comptroller, and it shall be the duty of the purchaser to file a return thereof with the Comptroller and pay the tax imposed thereon to the Comptroller within fifteen (15) days after such sale was made or service rendered."

thority in the present case in the absence of a like decision of the question by the Supreme Court of Texas. That such contention would not be a valid answer to our petition will presently appear.

In *Re: National Studios* [*City of New York v. Feiring* (C. C. A. 2nd Cir.), 118 Fed. (2d) 329], the City asserted a claim as entitled to priority, in the bankrupt estate of the *vendor* for taxes partly collected and partly not collected by the vendor from the purchasers. The majority concluded that the case was not ruled by *Re: Atlas Television Company, supra,* construing the latter as not holding that the taxes, *as taxes,* were due by the vendor; and held the claim not entitled to priority on the ground, of course, that the *tax* liability was upon the purchaser and not the vendor. In other words, the decision upon that point was the same as the Court below in this case. Judge Clark dissented and not merely showed that the majority misunderstood the *Re: Atlas Television Company* decision, but he independently reasoned the question decided. Citing *Barbee v. Oklahoma Tax Commission* (10th Cir.), 103 Fed. (2d) 114, construing an Oklahoma statute in the same way as in *Re: Atlas Television Company* case, he said: "In actual fact the obligation of the vendor has all the characteristics of a tax; an absolute duty to pay, regardless of his failure to collect; a liability for all taxes, even though he need not collect on sales less than twelve cents (12¢) (as established by the Comptroller's regulations authorized by law); and enforcement against him by suit or tax distraint. I do not see why this is not properly a tax levy against both vendee

and purchaser, as seems the city's obvious intent certainly so far as remedies are concerned. [The reference to the purchaser's liability was, of course, to said Section 2 of the Act hereinbefore quoted as to which there is no corresponding provision in the Texas Statute.] But whomever this tax is said to be 'on' it is evident that when not paid the vendor will generally be the one proceeded against; and in that event, he shall pay the 'tax.' I do not believe his bankruptcy changes its character." The Supreme Court granted writ of certiorari and reversed the decision, thereby sustaining the opinion of Judge Clark. The writ was granted, says the Court, "because of the suggested failure of the Court below to follow our decision in *New York v. Goldstein*, 299 U. S. 522 * * * reversing *Re: Lazaroff* (C. C. A. 2nd Cir.) * * * and of the asserted conflict in principle of the decision below with that of the Court of Appeals for the Tenth Circuit in *Barbee v. Oklahoma Tax Commission*, 103 Fed. (2d) 114; 39 Am. Bankr. Rep. (N. S.) 562." Thus, does it appear with certainty that the writ was not granted merely because of *Re: Television Company, supra*, construing the local statute, and only because it was claimed, binding upon the Supreme Court. The Court in the opinion says: "Whether the present obligation is a 'tax' entitled to priority within the meaning of the statute is a Federal question [citing cases] * * *. Intended to be nationwide in its application, nothing in the language of Section 64 or its legislative history suggests that its incidence is to be controlled or varied by the particular characterization by local law of the State's demand. Hence, we look to the terms and purposes of the Bankruptcy

Act as establishing the criteria upon the basis of which the priority is to be allowed." After discussing provisions of the New York statute, in principle the same as provisions of the Texas Statute, except the one heretofore mentioned, being Section 2 providing for alternative liability of the purchaser, the opinion continues: "The statute thus contains provisions which in its normal operation are calculated to enable the seller to shift the tax burden to the purchaser. [See authorities.] * * * But it is plain that both the vendor and the vendee [in the Texas Statute, only the vendor] are made liable for payment of the tax in invitum without regard to those provisions by which the seller may shift the incidence of the tax to the buyer and the tax may be summarily collected by distraint of the property of either the seller or the buyer. [In Texas only the seller.] A pecuniary burden so laid upon the bankrupt seller for the support of Government and without its consent thus has all the characteristics of a *tax*, entitled to priority of payment, in bankruptcy within the meaning of Section 64 of the Bankruptcy Act * * *. It is not any the less a *tax laid on the seller* because the statute [but not the Texas statute] places a like burden in the alternative on the purchaser, or because it affords to the seller facilities of which he did not avail himself to pass the tax on to the buyer. While an action in debt may be resorted to for the recovery of a tax, it is evident that in this case the bankrupt is liable to the State *only* because it was a *tax* [citing authorities]." The opinion concludes "For reasons already given,

the duty imposed upon the seller by the taxing act thus construed is also *a tax within the meaning of the Bankruptcy act.*"

In its reasoning, by which this Court thus reached its conclusion, it is clear the Court was not merely stating propositions as decided in *Re: Atlas Television Company, supra,* but was primarily construing and applying Section 64a(4) of the Bankruptcy Act. The fact that the particular statute involved contained an alternative provision which made the purchaser directly liable to the State, independently of the liability of the vendor, does not detract from the authoritativeness of the *Feiring* case upon the question of whether in the instant case The Texas Company merely owed a debt to the State and not a tax. The indisputable fact that the Texas Statute contains no provision by which the purchaser is liable to pay anything directly to the State makes the *Feiring* case express authority on the tax or debt question, and in principle, authority on the subrogation question. This will appear more fully from the decisions presently to be discussed.

In *In Re: Newland* (C. C. A. 3rd Cir.), 115 Fed. (2d) 165, a Pennsylvania gasoline tax statute was involved, and the opinion does not purport to be based on, or controlled by, decisions of the State Courts of Pennsylvania construing the statute. It was held (the syllabus correctly summarizing the holding) that "A distributor of gasoline which paid to commonwealth of Pennsylvania amount of tax assessed against distributor for gasoline sold to bankrupt as consumer was not entitled to priority for amount

paid on ground that distributor was subrogated to rights of commonwealth since, under Pennsylvania Tax Statute, there was no 'primary obligation' by bankrupt as consumer to pay amount of tax." The opinion quotes what was regarded as the principal provision of the Statute thus: " 'Distributor shall be liable to the commonwealth for the collection and payment of the tax imposed by this Act. The tax imposed by this Act shall be collected by the distributor at the time the liquid fuels are used or sold and delivered by the distributor, and shall be borne by the consumer'." Continuing, the opinion specified other provisions as follows: "In its supplementary sections, the law advises distributors that (1) they must obtain a permit and furnish a bond, 72 P. S., Section 2611c; (2) they must pay the tax and report such payment, 72 P. S., Section 2611f; (3) they must keep records and have them available for examination, 72 P. S., Sections 2611h, 2611i; (4) they, and they alone, are entitled to refunds, 72 P. S., Section 2611q. That relationship is not altered by any attempt to shift according to the true incidence or by any legislative expression of what that true incidence is. In the analogous statute of the State of New York, the language shifting the incidence is more vigorous and yet even here, the Court of Appeals for the Second Circuit denies priority and so, subrogation." (Citing *In Re: Conklin, supra.)* It is manifest that every provision of the law thus stated could as well be said of the Texas Statute, except "(4) they, and they alone, are entitled to refunds." In the Texas Statute, one provision for refunds applies alone to purchasers or users of gasoline purchased for use for other than highway purposes; the

other applies to dealers or generally, and relates to gasoline in quantities of one hundred gallons or more destroyed by fire or accident, and to gasoline sold to agencies of the Federal Government. Apparently the Pennsylvania statute (unless the Court overlooked it) did not contain the first of the above two provisions of the Texas Statute. However, no serious contention could be made that this "supplementary section" would control the "principal section" or call for any different construction of the Statute on the points material here.

Here, then, we have a Circuit Court of Appeals' decision directly contrary to the decision under review upon the two controlling elements—sole tax liability of the seller, and because thereof, no subrogation resulting from payment of taxes by the one solely liable.

In Re: Conklin (Gulf Oil Corporation v. Grady, supra), involved a New York Motor Fuel Tax Law. Like *In Re: Newland*, it was not based upon any construction of the Statute by the State Courts. The seller of gasoline who paid the taxes to the State sought to have its claim in the bankrupt estate of the *purchaser* allowed as a priority. The Court said: "There is no basis for the claimed priority. The appellant was a 'distributor' of motor fuel as defined in Article 12-A, and the Statute makes the distributor, *not the purchaser*, the tax payer, even though the declared intention of Sec. 289c is to place the ultimate burden of the tax on those persons who use the motor fuel for the operation of motor vehicles on the highways. See *In Re: Riemer* (C. C. A. 2nd Cir.), 82 Fed. (2d) 162, 163. *There*

is no provision in the New York Statute under which the State may collect the gasoline tax from the purchaser or 'owner.' Hence, the theory of subrogation is without foundation; *the distributor cannot get subrogation by the payment of what is its own obligation.* The cases dealing with the statutes of other states upon which the appellant relies involve statutes in which the State could have filed its tax claim in the bankruptcy proceeding. The debt which the bankrupts here owe the appellant is not one 'for taxes legally due and owing by the bankrupt to * * * any state', *for in any event, the bankrupt could not be considered the primary tax payer.*" Here, as to the controlling elements, we have the whole contention of Respondent fully answered. Two decisions could hardly be in more certain and direct conflict than this and the one herein sought to be reviewed. The supremely important and controlling fact, common to the New York Statute involved in *In Re: Conklin* and the Texas Statute involved in the present case is that "there is no provision in the New York Statute [nor the Texas Statute] under which the State may collect the gasoline tax from the purchaser or 'owner'."

In Re: Riemer (C. C. A. 2nd Cir.), 82 Fed. (2d) 162, also involved the New York Motor Fuel Statute, the construction of which does not appear to have been influenced by the decisions of the New York State Courts. It sustained a claim of priority and in doing so, is in perfect accord with the above decisions which denied priority. The Court said that as appellant believed that its claim is for taxes due, which are to be ordered paid under Section 64 of the Amended Bankruptcy Act: "It is necessary to determine

whether or not the State law mentioned did impose a tax upon the bankrupt as a distributor. Section 283, Tax Law (N. Y.) requires distributors to be registered and to file an approved bond, or make permitted substitute provision 'to secure the payment of any sums due from such distributor pursuant to this article.' Section 284, Subdv. 1, lays the tax as follows: 'There is hereby levied and imposed *an excise tax* of two cents per gallon upon motor fuel sold within the State by a distributor. Section 287 requires the distributor to pay the tax. After making provision for his filing monthly returns, it provides that: 'Each such distributor shall pay to the Department with the filing of such return the tax imposed by this article on each gallon of motor fuel sold by such distributor in the State as so reported during the period covered by such return, after deducting therefrom an amount equivalent to one percentum of the amount due, which is hereby allowed the distributor on account of services and expenses in complying with the provisions of this article. Section 289 deals with proceedings against the distributor to recover the tax 'whenever any distributor shall fail to pay' as the article requires. Section 289c relates to refunds. *They are to be made to purchasers, not to distributors* [the same as one provision—and the only one material here,—of the Texas Statute] under the conditions stated, and the reason for this restriction as to refunds is found in subdivisions (1) and (2), which follow in so far as material.

" '1. The tax imposed by this article, though payable by the distributor, shall be borne by the purchaser and when paid by the distributor, *shall be deemed to have been so*

paid for the account of the purchaser. No person shall sell, advertise, or offer for sale, motor fuel separate from the tax herein imposed'; and the price paid by the purchaser for motor fuel on which the tax has been paid, if such price be not less than the amount of the tax thereon, shall be presumed, for the purposes of this section, to have included the tax.

" '2. However, the intention of this article is to place the ultimate burden resulting from such tax, so far as possible, on persons who use the public highways of the State for operating motor vehicles thereon.'

"Thus, it appears that so far as *refunds are concerned,* the tax, though payable by the distributor against whom the State may take action in the event of non-payment, is to be treated as paid ultimately not by him, but by the purchaser from whom he is presumed to collect it and for whose account he pays it to the State. That is but the *theory, however, upon which refunds are made.* It does not alter the obligation of the distributor to pay the tax within the period for which he must file a return and to do so whether he has then collected the amount from purchasers or not. *Nor is he entitled to a refund when he has paid the tax but has not been paid for the motor fuel by the purchaser.* * * * Clearly, the sale by the distributor is what is taxed, and when he sells, he becomes liable to the State for the tax, whether he sells on credit or for cash. It is to him *alone* that the State looks for payment, and against him alone proceedings to recover the tax are to be taken under Section 289, if he fails to pay within the time limited. Thus, the law which imposes the tax upon sales of motor fuel by

a distributor *makes the distributor the tax payer*, though he is not only permitted but presumed to shift the burden to the consumer."

The language of this opinion as above quoted shows the conflict between the decision and the one herein sought to be reviewed, upon every material question in the case, including besides, the immaterial question of the right to the refund. This case is particularly helpful as showing how the decision in the instant case would operate where the purchaser pays the amount of the taxes to the dealer, but the latter fails to pay the State and becomes bankrupt. It is necessarily implicit in the decision under review that if the purchaser, in addition to the sale price of gasoline, pays the dealer the amount which the dealer is under legal liability to pay the State as taxes, the taxes are *paid*, regardless of whether the dealer does or does not pay the State. Either the liability of the purchaser to pay the amount of the taxes to the dealer is liability for a *tax*, and not a *debt;* or the liability of the dealer to pay the State is liability for a *debt* and not a *tax*. We believe this statement is true beyond controversy. Obviously, if the purchaser pays the amount of the tax to the dealer, not as a debt but as a tax, the tax liability will thereby be discharged; and there can thereafter exist no claim of the State *for taxes due by the bankrupt dealer*, to the State. Under the decision, if Sitton & Herbert had paid the amount due as taxes to the dealer and the latter, without paying the taxes to the State, had become bankrupt, then the State, to which the bank-

rupt would undoubtedly be indebted, could have no priority under Article 64a(4), simply because if payment by the purchaser to the dealer constituted payment of the *taxes*, that would discharge the tax liability and the only claim that the State could assert against the dealer would be for a debt. Section 64a(4) could not apply because it only applies where the claim is for taxes—not a debt—due by the bankrupt.

Thus, it is demonstrated, that according to the decision under review, the provision of Article 64a(4) is in effect completely nullified when asserted in the bankrupt estate of the vendor or dealer.

As presumably opposed to all the array of authority hereinabove discussed, the Court below, upon the controlling points, cited only one case, being *The Texas Company v. Blue Way Lines, Inc.* (C. C. A. 1st Cir.), 93 Fed. (2d) 593. In that case the Court simply said that the "gasoline tax is an excise tax *on the consumer* * * *." The decision was either controlled by statutes different from the one involved here, or, like *In Re: Lazaroff, supra*, has been overruled by the decisions hereinbefore cited. We deem it unnecessary to discuss the case, because, if it sustains the decision of the Court below here sought to be reviewed, that, if not an added reason why this Court should take jurisdiction to settle the conflicts pointed out, certainly does not detract from the force of the reasons why this Court should do so.

CONCLUSION

In conclusion, may we point out that the Court below, in holding that the primary tax liability was that of the purchaser, and that the dealer, by payment of the taxes, acquired by subrogation the right to priority payment of its claim in bankruptcy to the extent of the refund, rendered the other questions discussed of little or no importance. We, all along, conceded that if the primary tax liability was on the purchaser, then, the claim was entitled to priority, not only for the amount of the refund but for the whole amount of the claim. But the basic question, though definitely decided, was not discussed, and none of the authorities we urged upon such question was attempted to be explained, distinguished, or even mentioned in the Court's opinion. The opinion deals more with the Court's idea of justice and equity, apparently overlooking the fact that such questions were eliminated if its conclusion on the main question was correct. The Court said: "It can hardly be denied that it would be unjust for The Texas Company to pay the tax *which its customer owes* and then to allow the customer, who did not pay the tax, to be refunded the amount thereof." This was considered to be unjust enrichment, calling for discussion, in connection with the claim of right to priority, of principles relating to equitable liens, constructive trusts, etc. The obvious answer is that under the Statute, The Texas Company did not "pay the tax *which its customer owes*", but only paid the tax which it owed. The error in concluding otherwise is the necessary foundation of the subsequent discussion, equities and trusts. In *Re: Riemer, supra*, forcefully answers what the

Court said about injustice and equities by saying that, under the Statute there involved, being the same as the Texas Statute in this respect, *refunds "are to be made to purchasers, not to distributors"*; that *"the distributor is not entitled to a refund when he has paid the tax but has not been paid for the motor fuel by the purchaser*. Clearly the sale by the distributor is what is taxed and when he sells, he becomes liable to the State for the tax, whether he sells on credit or for cash." The only alternative to such construction of the statute would forbid the dealer to sell without collecting in cash the amount which the dealer would have to pay as taxes to the State. Is Respondent prepared to accept the implications of such an interpretation of the law? No, for if so, that would place it in the position of having violated the law by failing to collect the tax, and then appealing to equity to save itself from the consequences of its own wrong.

Respondent paid only the taxes which it was liable to pay, wholly without reference to any right of refund in favor of anyone. It was charged with knowledge of the provisions of the Statute that, although required to pay the taxes, it was not entitled to any refund, the only provision for a refund of taxes on gasoline sold for use, and used, for purposes other than upon highways being to the purchaser or user, not the dealer.

In effect, the position of The Texas Company is that while it duly *collected* the taxes (by accepting the obligation of the purchaser to pay later, in lieu of present payment in cash), that transaction did not constitute *payment*

by the purchaser, which the Statute appears to make a condition precedent to the right of a purchaser to a refund. So what? Although the Statute makes no provision in any event for a refund to a dealer, of taxes on sales to a purchaser for use, and used, other than upon highways, yet because the refund was, in fact, made to the Trustee, who, as against the State (as it is claimed), has no right to receive same, a court of equity will step in and, in effect, add a proviso to the Statute that when a purchaser fails to qualify to be paid a refund, the dealer shall have such right; also, in effect, to write into the Bankruptcy Law a right of preference or priority in addition to those specified by the law.

Any question regarding right to the refund or fact that the refund (even if without right) was made to the Trustee, has no relation to the ultimate question: Was the dealer's claim, in the bankrupt estate of the purchaser, for the amount of taxes which (whether collected or not) it was *required to pay the State*, and did pay, entitled to priority under Section 64a(4) of the Bankruptcy Act. The *refund* was *not a tax*. The obligation, if any, to make the refund was not a tax liability. The State *owed* no taxes in any event, therefore, the refund, if enforceable, was a debt due by the State to the bankrupts. It could, therefore have no relation to priority [as declared by Section 64a(4)], which applies only to *taxes due by the bankrupt*. Subrogation being a basic element in the claim for priority, any question regarding the refund could have no relation to the question of subrogation. Any operation of the principle of subrogation which could possibly have any relation to the

question of priority would necessarily involve a right of the State *against* the bankrupts. The right, if any, to the refund was a right of the bankrupts *against* the State. It was, therefore, not a subject matter upon which the asserted subrogation could operate. Any relevant question of subrogation was dependent upon the purchaser's *primary* liability to the State.

The net result is that the Court below by grounding its decision upon the basic error of holding that under the Statute and Section 64a(4) of the Bankruptcy Act the purchaser and not the dealer was made the tax payer, thereby invalidated its conclusion, subsequently discussed.

Upon the authority of all these cases, we earnestly pray the Court to grant the writ of certiorari and reverse the judgment of the Court below.

Respectfully submitted,

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